

**Office of Chief Counsel
Internal Revenue Service**

memorandum

CC:SB:2:GBO:GL-608081-00
JGramling

date: .

to: Manager, SB/SE Compliance Technical Support Group
Area 4 (Greensboro) Room 312
Attn: Connie Ward

from: Associate Area Counsel, SB/SE 2

subject: Your request for Counsel Opinion
Interest Abatement

This refers to your memorandum dated September 14, 2000, requesting our advice generally with respect to the abatement of interest where a Service employee provides a taxpayer with an erroneous payoff amount, and specifically in the context of an actual case, the history of which was attached to your memorandum. You also requested our advice as to the Service's discretionary powers to abate interest.

ISSUES

1. Is the failure to abate interest which accrues on a trust fund recovery penalty an abuse of discretion under section 6404(e) where the interest is unassessed at the time an incorrect payoff amount is furnished to the taxpayer, but the interest is subsequently assessed after the taxpayer pays the payoff amount.
2. How much discretion does the Service have to abate interest.

CONCLUSION

1. Since the Service does not have the authority under section 6404(e) to abate interest which accrues on a trust fund recovery penalty, the failure to do so cannot be an abuse of discretion. On the other hand, the failure to abate interest which accrues on a deficiency, or on a payment of tax described in section 6212(a) may be an abuse of discretion, provided the statutory requirements are met.

Under section 6404(a), the Service may abate the unpaid portion of any tax, including interest on a trust fund recovery penalty, that is excessive in amount, assessed after the statute of limitations has expired, or erroneously or illegally assessed.

2. The Service only has authority to abate interest in cases where the statutory requirements are met. Once the statutory requirements are met, the Service has broad discretion to abate interest.

FACTS

Due to ambiguities in the Code and the Regulations, you requested our advice with respect to the abatement of interest, specifically where a taxpayer is given an erroneous payoff amount and relies on the incorrect amount in paying off the liability. As you noted, in such situations, although the interest may be clearly due, other considerations such as hardship often are present.

You attached to the memorandum information with respect to [REDACTED], of [REDACTED], who is represented by former Service employee [REDACTED]. We understand the facts relating to [REDACTED] case to be as follows. [REDACTED] is [REDACTED] years old. He incurred a liability for trust fund recovery penalty taxes ([REDACTED] percent penalty) as provided by I.R.C. section 6672 for the taxable period ended [REDACTED]. According to the transcript, \$[REDACTED] was assessed on [REDACTED]. However, the ten year period for collection would be tolled from [REDACTED], until [REDACTED], and for [REDACTED] months thereafter, since it is our understanding that [REDACTED] was in bankruptcy during that time. I.R.C. §§ 6502, 6503. Additionally, the limitations period would have been tolled during the period of time his offer in compromise was pending in [REDACTED], and for one year thereafter. Accordingly, under the above analysis, the collection statute would remain open until [REDACTED].

Subsequently, on or about [REDACTED], [REDACTED] entered into an installment agreement with respect to the liability. Based thereon, he made fairly consistent monthly payments in the amount of \$[REDACTED] through [REDACTED]. The Service also applied income tax refunds to the liability. On [REDACTED], pursuant to another installment agreement, [REDACTED] began making monthly payments in the amount of \$[REDACTED] which he continued until [REDACTED], when a payment in the amount of \$[REDACTED] was posted. Based on the transcript, [REDACTED] made total payments, including income tax refunds, in the amount of \$[REDACTED].¹

According to [REDACTED], [REDACTED] received a Notice of Intent to Levy in [REDACTED], which stated that [REDACTED] had defaulted on his installment agreement. When he called to inquire, however, the Service employee informed him that there was no default and that the balance due was \$[REDACTED]. [REDACTED] also stated that [REDACTED] electing to borrow the balance due amount, hand-delivered a cashier's check in the amount of \$[REDACTED] to the Greensboro walk-in counter on [REDACTED], after confirming the amount due with an IRS employee. The balance due reported by the two Service employees was consistent with copies of account statements [REDACTED] furnished reflecting steadily declining balances due which were commensurate with the payoff amount petitioner received.

In [REDACTED], however, [REDACTED] received another Notice of Intent to Levy reflecting a balance due in the amount of \$[REDACTED], which [REDACTED] was informed was interest assessed after he made the payment which he thought satisfied the liability. The transcript reflects that interest in the amount of \$[REDACTED] was assessed on [REDACTED]. It is our understanding that in the context of trust fund recovery penalty assessments, it is not unusual for assessments of interest to be made in such a fashion, and a review of the transcripts reflects that only two prior assessments of interest were made, one on [REDACTED] in the amount of \$[REDACTED] and the other on [REDACTED], in the amount of \$[REDACTED]. It is also our understanding that the federal tax liens with respect to [REDACTED] have been released and not refiled, and that [REDACTED] and his [REDACTED] purchased a [REDACTED] [REDACTED] ago.

¹The transcript reflects several \$[REDACTED] payments posted after the March payment of \$[REDACTED].

██████████ representative seeks abatement of all of the recently assessed interest, which she states would result in an overpayment of at least \$██████████.

DISCUSSION

In order to be entitled to an abatement, ██████████ must satisfy the provisions of I.R.C. section 6404(a) or section 6404(e). Under the provisions of I.R.C. § 6404(a), the Service is authorized to abate the unpaid portion of an assessment of tax (or liability related thereto) which is (1) excessive in amount, (2) which is assessed after the expiration of the statute of limitations, or (3) which is erroneously or illegally assessed. In this case, however, since there is no evidence the assessment is excessive, made after the expiration of the statute of limitations, or illegally or erroneously made, the taxpayer must show that he is entitled to an abatement of interest under the provisions of section 6404(e).

Section 6404(e), as in effect for the year of the tax liability at issue, provides that the Commissioner may abate the assessment of interest on (1) a deficiency (as defined in section 6211(a)) which is attributable to an error or delay by a Service officer or employee acting in an official capacity in performing a ministerial duty; or (2) a payment of tax described in Section 6212(a) to the extent that an error or delay in such payment is attributable to a Service officer or employee in performing a ministerial act.²

In a case where there was a delay in payment caused by the Service's failure to inform the taxpayer of the correct amount due on his income tax liability, the Tax Court held that the Service's failure to abate interest attributable to such delay was an abuse of discretion. See Douponce v. Commissioner, T.C. Memo. 1999-398. In Douponce, the Service employee quoted to the taxpayer an amount not including some accrued interest which had not yet been assessed. The taxpayer paid the quoted amount; however, when the taxpayer became aware of the additional amount owed, he promptly paid it. Accordingly, the Tax Court determined that the Service's failure to abate the interest attributable to

²With respect to tax years beginning after July 30, 1996, respondent is authorized to abate interest attributable to an "unreasonable" error or delay resulting from "managerial" as well as ministerial acts. These changes, however, do not apply to this case since the taxable year at issue is prior to the effective date. Taxpayer Bill of Rights 2, Pub. L. 104-168, 110 Stat. 1452, 1457 (1996).

the period of time beginning when the taxpayer paid the amount quoted to him by the employee and ending at the time when the Service notified the taxpayer of the additional interest due was an abuse of discretion. See Treas. Reg. § 301.6404-2(c), Ex. 11. Based on Douponce and the Treasury Regulation, with respect to an income tax liability, an employee's failure to access current data in supplying an erroneous payoff may constitute a ministerial act, justifying abatement of the interest attributable to the delay or error.³

On the other hand, [REDACTED] case involves interest on a trust fund recovery penalty, which is not covered by section 6404(e). The Tax Court has found that the Service is not authorized under section 6404(e) to abate interest assessments on employment taxes. See Woodral v. Commissioner, 112 T.C. 19 (1999); Miller v. Commissioner, T.C. Memo. 2000-196. Section 6404(e) covers either a "deficiency," which is defined in section 6211(a), or a "payment" of a tax described in section 6212(a), which includes income tax, estate tax, gift tax, certain generation-skipping transfers, and excise taxes, etc. In [REDACTED] case, there is no "deficiency," nor is there a "payment" of tax of the kind described in section 6212(a). Accordingly, since the trust fund recovery penalty is not covered by the provisions of section 6404(e), the Service has no authority to abate interest which accrues thereon, and the Service's failure to do so cannot be an abuse of discretion.

Even if in this case the interest had accrued on a type of tax covered by the provisions of section 6404(e), such as income tax, the entire amount of interest would not be subject to abatement under the rationale used by the Court in the Douponce case. As in the Douponce case, the facts of which are strikingly similar to the case at hand, the ministerial error or delay could only have occurred at the time when [REDACTED], relying on the incorrect payoff amount, paid the lower amount. Accordingly, if the interest in this case had been covered by section 6404(e), the interest could only have been abated from [REDACTED] when [REDACTED] made the payment based on the incorrect amount, and [REDACTED], when he received the Notice of Intent to Levy informing him of the additional interest. See Douponce v. Commissioner, T.C. Memo. 1999-398.

³The copy of the INTST transcript attached to your memorandum reflects that there was a "computation hold on interest/FTP" with respect to the trust fund recovery penalty.

In enacting the Taxpayer Bill of Rights 2 (TBOR 2), Congress gave the Tax Court jurisdiction to review whether the Service's failure to abate interest was an abuse of discretion. See section 6404(g), which was redesignated section 6404(i) by amendments to the IRS Restructuring and Reform Act of 1998. The Tax Court will determine the Service's failure to abate interest to be an abuse of discretion only where such discretion is exercised "arbitrarily, capriciously or without sound basis in fact or law." Woodral v. Commissioner, 112 T.C. 19 (1996). Based on the above, the Service's authority to abate interest is only activated once the statutory requirements are met; once the requirements are met, the Service has broad latitude to abate interest.

Please keep in mind that Congress intended that abatement only be permitted where the failure to do so would be "widely perceived as grossly unfair." S. Rep. No. 99-313 at 208, 1986-3 C.B. 208. For your information, we are attaching a checksheet listing the points to be considered in determining whether an abatement of interest is proper under the provisions of section 6404(e).

Although it would not be proper to abate interest in
(b)(5)(AC) case under the provisions of sections 6404(a) or (e),
(b)(5)(AC)

We will be pleased to review any other specific cases you have with respect to claims for interest abatement. If you have any questions, please contact me at 2229.

JEANNE GRAMLING
Senior Attorney (SBSE)

Attachment: As stated

ABATEMENT OF INTEREST UNDER SECTION 6404(e)

1. Is the interest with respect to a deficiency or a payment of tax relating to income, estate, gift, generation skipping, or certain kinds of excise taxes?

If not, and the interest relates to another type of tax not covered by section 6211(a) or 6212(a), the Commissioner is not authorized to abate interest with respect thereto.

2. Is the claim for abatement of interest with respect to a tax year before or after July 30, 1996?

If before July 30, 1996, the claimed error or delay must be attributable to a ministerial act; if after July 30, 1996, the claimed error or delay must be attributable to either a ministerial or a managerial act and further must be "unreasonable."

3. Did a Service employee make an error or delay in performing a ministerial or managerial act?

If not, then there is no authority to abate interest.

A. Did the act which caused the claimed error or delay involve the use of judgment or discretion?

If yes, then the act cannot be deemed to be ministerial.

B. Was the act based on a decision concerning the proper application of federal law?

If yes, then the decision cannot be a ministerial act.

C. Is the act a procedural or mechanical act which occurs during the processing of the taxpayer's case and after all prerequisites to the act, such as conferences and supervisor review have taken place?

If yes, then there may be a ministerial act justifying the abatement of interest, provided the other statutory requirements are met.

If not, then there is no ministerial act.

D. If the interest is with respect to a tax year after July 30, 1996, does the act involve the loss of records, the transfer of Service personnel, or the granting of extended sick or other leave, including leave for training?

If yes, then there may be a managerial act warranting the abatement of interest, provided the other statutory requirements are met.

4. Did the claimed error or delay occur before or after the Service contacted the taxpayer in writing with respect to the deficiency or the payment?

If before, then abatement is not justified.

If after, then abatement may be justified, provided the other statutory requirements are met.

5. Did the taxpayer contribute to or cause any significant aspect of the error or delay?

If yes, then abatement is not justified.

If not, then abatement may be justified provided the other statutory requirements are met.